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Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Army Corps of Engineers' authority to issue a permit for the discharge of dredged or fill material, pursuant to the statutory scheme that specifically addresses such material, is displaced by the Environmental Protection Agency's promulgation of an effluent limitation or new-source performance standard pursuant to other provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, that address the discharge of pollutants generally.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 13
Argument:
The proposed discharges at issue in this case are governed by Section 404 rather than Section 402 of the Clean Water Act. 16
A. A discharge of fill material is subject to Section 404's permitting scheme, notwithstanding EPA's promulgation of an otherwise applicable effluent limitation. 17
1. The text, structure, and purpose of the Act dictate that a discharge of fill material be regulated under Section 404, not under Section 402 18
2. The Ninth Circuit's interpretation cannot be reconciled with the unambiguous terms of the Act 23
3. The Corps' and EPA's longstanding interpretations of the Act's regulatory scheme resolve any ambiguity 26
B. The Corps and EPA properly concluded that the proposed discharge of mine tailings constitutes a "discharge of fill material." 29
1. The agencies' considered adoption of an effects-based definition of "fill material" provides an administrable line between Section 402 and Section 404 discharges 29

Table of Contents—Continued: Page

2. The agencies' conclusion that the proposed discharge constitutes a "discharge of fill material" under the fill rule is controlling 33
Conclusion 41
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 16, 34
Bowles v. *Seminole Rock Co.*, 325 U.S. 410 (1945) 34
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 26, 28, 29, 30
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 34
Clifford F. MacEvoy v. *United States for the Use & Benefit of Calvin Tomkins Co.*, 322 U.S. 102 (1944) 19
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 25, 26
IBP, Inc. v. *Alvarez*, 546 U.S. 21 (2005) 34
National Assoc. of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 38
National Cable & Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002) 19
National Wildlife Fed'n v. *EPA*, 286 F.3d 554 (D.C. Cir. 2002) 34
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) 35
Rapanos v. *United States*, 547 U.S. 715 (2006) 19, 26

Cases—Continued: Page

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 34
Russello v. *United States*, 464 U.S. 16 (1983) 21

Statutes and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.* 2
§ 101(a), 33 U.S.C. 1251(a) 2
§ 301, 33 U.S.C. 1311 ..... *passim*
§ 301(a), 33 U.S.C. 1311(a) 2, 15, 23, 24, 25
§ 301(e), 33 U.S.C. 1311(e) 15, 23, 25
§ 302, 33 U.S.C. 1312 ..... 22, 24
§ 302(k), 33 U.S.C. 1312(k) 22
§ 304, 33 U.S.C. 1314 37
§ 306, 33 U.S.C. 1316 ..... *passim*
§ 306(a), 33 U.S.C. 1316(a) 5
§ 306(a)(1), 33 U.S.C. 1316(a)(1) 5
§ 306(b), 33 U.S.C. 1316(b) 5
§ 306(e), 33 U.S.C. 1316(e) 5, 15, 23, 25
§ 307, 33 U.S.C. 1317 ..... *passim*
§ 307(a)(5), 33 U.S.C. 1317(a)(5) 21
§ 318, 33 U.S.C. 1328 ..... 18, 19, 24
§ 318(a), 33 U.S.C. 1328(a) 18
§ 318(b), 33 U.S.C. 1328(b) 18
§ 402, 33 U.S.C. 1342 ..... *passim*
§ 402(a), 33 U.S.C. 1342(a) 5, 18
§ 402(a)(1), 33 U.S.C. 1342(a)(1) 20, 25
§ 402(a)(1)(A), 33 U.S.C. 1342(a)(1)(A) 5
§ 402(k), 33 U.S.C. 1342(k) 22

Statutes and regulations—Continued: Page

§ 403, 33 U.S.C. 1343 22
§ 404, 33 U.S.C. 1344 ..... *passim*
§ 404(a), 33 U.S.C. 1344(a) 3, 18
§ 404(a)(1), 33 U.S.C. 1344(a)(1) 20
§ 404(b), 33 U.S.C. 1344(b) 20
§ 404(b)(1), 33 U.S.C. 1344(b)(1) ..... *passim*
§ 404(c), 33 U.S.C. 1344(c) 4, 9, 23
§ 404(p), 33 U.S.C. 1344(p) 5, 22
§ 502(7), 33 U.S.C. 1362(7) 2
§ 502(11), 33 U.S.C. 1362(11) 5
§ 502(12), 33 U.S.C. 1362(12) 2
§ 505, 33 U.S.C. 1365 22
Clean Water Act of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599 19
Federal Water Pollution Control Act, Pub. L. No. 92-500, § 318, 86 Stat. 877 18
16 U.S.C. 478 7
16 U.S.C. 482 7
33 C.F.R.:
Section 320.4(a)(1) 4
Section 323.2 16
Section 323.2(e) 13
Section 323.2(e)(1) 3, 29, 33
Section 323.2(f) 3, 13, 29, 33
36 C.F.R. 228.4(a) 7

Regulations—Continued: Page

40 C.F.R.:
Pt. 122:
Section 122.2 6
Section 122.3(b) 27
Pt. 125:
Section 125.4(d) (1973) 27
Pt. 230 3
Section 230.1(c) 4
Section 230.10(a) 4, 20
Section 230.10(b) 4
Section 230.10(b)(1) 21
Section 230.10(b)(2) 21, 27
Section 230.10(c) 4, 21
Section 230.10(d) 4, 21
Section 230.11(d) 21
Section 230.11(e) 21
Section 230.60 21
Section 230.61 21
Pt. 232:
Section 232.2 ..... 3, 13, 15, 29, 32, 33
Pt. 440:
Section 440.104 ..... 5, 38
Section 440.104(b)(1) 6

Miscellaneous:

118 Cong. Rec. 10,632 (1972) 22

Miscellaneous—Continued: Page

40 Fed. Reg. (1975):
p. 31,325 30
p. 41,298 30
42 Fed. Reg. (1977):
p. 37,122 30
p. 37,145 30
45 Fed. Reg. 33,421 (1980) 30
47 Fed. Reg. 25,682 (1982) 39
51 Fed. Reg. (1986):
p. 8871 ..... 27, 31
p. 8872 31
65 Fed. Reg. (2000):
p. 21,292 ..... 30, 31
p. 21,293 ..... 19, 20
p. 21,294 31
pp. 21,294-21,295 31
67 Fed. Reg. (2002):
p. 31,129 3
pp. 31,129-31,130 32
p. 31,130 ..... 12, 36
p. 31,132 32
pp. 31,132-31,133 31
p. 31,133 32
p. 31,134 31
p. 31,135 ..... 12, 27, 35, 36, 37, 39

Miscellaneous—Continued: Page

Letter from Alaska Dept. of Envtl. Conservation (June 17, 2005) <www.dnr.state.ak/mlw/mining/largemine/kensington/pdf/AK0050571cert.pdf> ... 11
S. 2770, 92d Cong., 1st Sess. (1971) 22
S. Rep. No. 1236, 92d Cong., 2d Sess. (1972) 23

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 486 F.3d 638.[1] The opinion of the district court (Pet. App. 38a-56a) is unreported.

[1] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 07-984.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2007. A petition for rehearing was denied on October 29, 2007 (Pet. App. 36a-37a). The petitions for a writ of certiorari in No. 07-984 and No. 07-990 were filed on January 28, 2008, and January 25, 2008, respectively. The petitions for a writ of certiorari were granted on June 27, 2008, and the cases were consolidated. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, CWA Section 301(a) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to the waters of the United States from any point source—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(7), 1362(12). In most cases, regulated entities achieve compliance with the relevant CWA provisions by obeying the terms of a permit issued under one of the Act's two complementary permitting programs: (1) a permit program for discharges of dredged or fill material, which is administered primarily by the Army Corps of Engineers (Corps) pursuant to Section 404 of the Act, 33 U.S.C. 1344; or (2) the National Pollutant

Discharge Elimination System (NPDES), which is administered by the Environmental Protection Agency (EPA) and approved States pursuant to Section 402 of the Act, 33 U.S.C. 1342.

a. CWA Section 404(a) authorizes the Corps to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). The Act does not define the term "fill material." On May 9, 2002, the Corps and EPA jointly published a rule to "clarify the Section 404 regulatory framework" and to adopt a uniform definition of "fill material." 67 Fed. Reg. 31,129.

The agencies' rule defines "fill material" to mean

> material placed in waters of the United States where the material has the effect of:
>
> > (i) Replacing any portion of a water of the United States with dry land; or
> >
> > (ii) Changing the bottom elevation of any portion of a water of the United States.

33 C.F.R. 323.2(e)(1) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). The fill rule specifically defines "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

The Section 404 permitting program is governed by regulations (known as the Section 404(b)(1) Guidelines) that Congress directed EPA to promulgate in consultation with the Corps under CWA Section 404(b)(1), 33 U.S.C. 1344(b)(1). The Section 404(b)(1) Guidelines (codified at 40 C.F.R. Pt. 230) establish numerous conditions to ensure that a Section 404 permit will be granted only where a discharge of dredged or fill material will not have "an unacceptable adverse impact" on the envi-

ronment. 40 C.F.R. 230.1(c). The Guidelines require the Corps to deny a permit if "there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a).

Under the Section 404(b)(1) Guidelines, a proposed discharge will not be permitted if it would violate any applicable State water quality standard or toxic effluent standard under CWA Section 307, or if it would jeopardize species listed as endangered or threatened under the Endangered Species Act. 40 C.F.R. 230.10(b). A Section 404 permit also must be denied where a discharge of dredged or fill material "will cause or contribute to significant degradation of the waters of the United States," such as by causing "[s]ignificantly adverse effects" on human health or welfare, aquatic and other wildlife, the aquatic ecosystem, or recreational, aesthetic, and economic values. 40 C.F.R. 230.10(c). No discharge will be permitted unless "appropriate and practicable steps have been taken which will minimize potential adverse impacts." 40 C.F.R. 230.10(d). Finally, under the Corps' public-interest review regulations, no permit can issue if the district engineer determines that the discharge would be "contrary to the public interest." 33 C.F.R. 320.4(a)(1).

EPA can veto (in whole or in part) a Section 404 permit if it determines that the discharge will have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. 1344(c). Once a Section 404 permit is granted, compliance with that permit shall be deemed compli-

ance with, *inter alia*, Section 301 of the Act. 33 U.S.C. 1344(p).

b. CWA Section 402(a) states that, "[e]xcept as provided" in Section 404, EPA may issue NPDES permits for the discharge of any pollutant into navigable waters "upon condition that such discharge will meet" the requirements of other enumerated provisions of the Act, including Section 306, 33 U.S.C. 1316. 33 U.S.C. 1342(a)(1)(A). Section 306 directs EPA to publish regulations establishing technology-based standards of performance, a type of effluent limitation, for effluent reduction from categories of new sources. 33 U.S.C. 1316(a) and (b).[2] Those new-source performance standards must reflect "the greatest degree of effluent reduction" achievable "through application of the best available demonstrated control technology, processes, operating methods, or other alternatives" and may require that pollutant discharges be avoided altogether. 33 U.S.C. 1316(a)(1). Section 306(e) states that "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. 1316(e).

In 1982, pursuant to Section 306, EPA issued a new-source performance standard for gold mine operations that use a froth-flotation milling process. 40 C.F.R. 440.104. The froth-flotation process involves placement of finely ground ore into tanks, where water and chemical frothing agents are added. J.A. 189a-191a. Those agents cause gold-bearing minerals to attach to air bub-

[2] An "effluent limitation" is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. 1362(11).

bles that rise to the surface of the mixture when air is pumped into the system, allowing the gold-bearing froth to be skimmed off the top. J.A. 191a. Tailings are the solid material (*i.e.,* residual ground rock) left in the bottom of the flotation tanks after the gold-bearing minerals have been removed. J.A. 192a. The new-source performance standard provides, except in circumstances not applicable here, that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process * * * for the beneficiation of * * * gold." 40 C.F.R. 440.104(b)(1). "Process wastewater" is defined as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product." 40 C.F.R. 122.2.

2. The instant case involves a challenge to the Corps' issuance of a Section 404 permit for proposed discharges of a tailings-wastewater slurry (solids-liquid mixture) that would change the bottom elevation of a lake. The Corps issued a Section 404 permit to petitioner Coeur Alaska, Inc. (Coeur) for the discharge of a tailings slurry from a froth-flotation mill into an impoundment in Lower Slate Lake, in conjunction with the proposed operation of the Kensington gold mine in southeast Alaska, about 45 miles north of Juneau. The tailings, once deposited, would raise the bottom elevation of the lake by 50 feet. Pet. App. 3a. The grant of the permit followed nearly two decades of analysis, completion of three environmental impact statements, and major revisions to the project that reduced its scope and environmental impacts. J.A. 340a-377a.

In July 1992, after issuing a final environmental impact statement (EIS), the United States Forest Service

(with the Corps as a cooperating agency) approved a plan of operations for a proposal differing in substantial respects from the current project.[3] That plan provided for on-site cyanide processing of gold concentrate derived from a froth-flotation mill, wet tailings impoundment in Sherman Creek, marine discharge of effluent, and an on-site camp for housing workers. Coeur applied for a Section 404 permit for creation of the tailings impoundment facility, but the Corps never issued a permit. See J.A. 351a-352a; C.A. ER 77.

In May 1998, after publishing a supplemental EIS, the Forest Service (with the Corps again as a cooperating agency) approved a revised plan of operations. That plan called for off-site cyanide processing of the froth-flotation concentrate and the creation of a "dry" tailings impoundment facility in nearby wetlands. The tailings slurry would be piped to a dewatering plant before deposition of the tailings into the impoundment. The mine would produce a total of 26 million tons of tailings, with 25% of that to be backfilled into the mine. In January 1998, the Corps issued a Section 404 permit to Coeur to construct the dry tailings facility and supporting infrastructure. See J.A. 352a.

In November 2001, after Coeur gained control of the Jualin Mine site (thereby altering the land status and gold-resource calculations), it submitted a revised proposal. J.A. 352a-353a. The stated purpose of the revised plan was to improve efficiency and reduce the extent of surface disturbance. J.A. 210a. *Inter alia*, the revised proposal eliminated the dry tailings facility, which would

[3] Because the Kensington mine is located in part on National Forest System lands, J.A. 208a, Coeur must obtain approval for its plan of operations from the Forest Service. 16 U.S.C. 478, 482; 36 C.F.R. 228.4(a).

have been located in wetlands, in favor of placing the tailings into an impoundment in Lower Slate Lake. The project would produce a greatly reduced volume of tailings, totaling 7.5 million tons, 40% of which would be backfilled into the mine. As with the prior proposal, the ore would go through on-site froth-flotation processing with the resulting concentrate shipped offsite for cyanide processing; but the froth-flotation mill would be relocated near the Jualin Mine site. The on-site housing camp was also eliminated in favor of a daily commute for mine workers. J.A. 353a.

In December 2004, the Forest Service, with the Corps, EPA, and State of Alaska as cooperating agencies, issued a final supplemental EIS (FSEIS) addressing two different sets of alternatives. See J.A. 159a. The first set (Alternatives A and A1), based on the 1998 proposal, involved use of a dry tailings facility situated in wetlands. The second set (Alternatives B, C, and D), based on the revised proposal, involved the discharge of a tailings slurry into the wet tailings impoundment at Lower Slate Lake and the construction of marine terminals at Slate Creek Cove and Cascade Point for the export of ore concentrate and daily transport of personnel. See J.A. 172a-184a.

On December 9, 2004, the Forest Service approved the plan, selecting Alternative D as its preferred alternative. J.A. 207a-248a. The Forest Service concluded —based on the FSEIS, input from all the cooperating agencies, and various mitigation measures—that Alternative D would provide "the best combination of components to minimize ground disturbance, reduce impacts to wetlands, provide safe and efficient transportation of workers, and reduce on-site fuel storage." J.A. 218a. In particular, the Forest Service found that Alternative D

"reduce[s] wetland disturbance by 171 acres compared to the previously approved plan," and that, unlike for Alternative A, "virtually all of the wetlands affected by Alternative D will be reclaimed following closure." J.A. 219a. The Forest Service also found that, unlike for Alternative A, reclamation of the tailings storage facility in Lower Slate Lake "will recreate habitat lost during operations and restore a viable fish population comparable to pre-operational conditions." *Ibid.* The State of Alaska also identified Alternative D as its preferred alternative. J.A. 216a-217a. EPA identified Alternative A as the environmentally preferable alternative, J.A. 300a, but did not exercise its Section 404(c) veto power.

On June 17, 2005, the Corps issued a Section 404 permit to Coeur for the discharge of fill material in the form of a tailings slurry into the Lower Slate Lake impoundment. J.A. 266a-272a. On July 15, 2005, the Corps issued a Section 404 permit to petitioner Goldbelt, Inc. (Goldbelt) for discharges from the construction of a marine terminal at Cascade Point. On March 29, 2006, after a temporary suspension and pending reevaluation, the Corps reinstated the permits and issued a Revised Record of Decision (ROD), explaining the basis of its permit grants. J.A. 340a-377a. The Corps determined that both permits complied with the Section 404(b)(1) Guidelines and with the Corps' public-interest review regulations. J.A. 340a-344a. Based on a detailed analysis of the alternatives, including comments from EPA and others, the Corps concluded that Alternative D "has the least environmental impact," "is the environmentally preferable alternative," and is the "least environmentally damaging practicable alternative" for the project. J.A. 354a.

Coeur's Section 404 permit authorizes the discharge into the Lower Slate Lake impoundment of a maximum of 4.5 million tons of tailings over the 10-15 year life of the project, or up to 1440 tons per day. Pet. App. 6a. The tailings would be transported from the froth-flotation mill to the impoundment in a slurry (55% solids by weight) through a 3.5-mile pipeline. *Ibid.*; J.A. 194a. Before the tailings slurry leaves the mill, a polymer and flocculant would be added to agglomerate the smaller tailings and enhance settling once the slurry is deposited into Lower Slate Lake. *Ibid.* Those additives are nontoxic and would have no effect on water quality. *Ibid*. The tailings slurry would be discharged through perforations in the bottom of the submerged pipe and deposited deep enough to prevent remobilization. *Ibid.*; J.A. 361a.

The permit requires reclamation of the lake after the completion of mining operations. J.A. 360a-363a. It is anticipated that most aquatic life in Lower Slate Lake would be lost during mining operations, primarily from being covered with the discharged tailings rather than from chemical toxicity. J.A. 361a. According to the Corps, the level of metal contaminants would pose a low risk, and although the pH around the discharge pipe would be toxic to the aquatic environment, that toxicity "will dissipate very rapidly." J.A. 360a. The Corps also found that the required capping of the tailings would assist in reestablishing the lake bottom habitat. J.A. 361a. By the project's closure, the lake's surface will have risen significantly, and the lake will have grown from its current size of 23 acres to approximately 62 acres in area (consisting of 47 acres of deepwater habitat and 15 acres of aquatic shallow-water habitat). J.A. 362a. The Corps therefore expects that the lake

"will recover over time" and eventually "will provide at least equivalent productivity as the current conditions of Lower Slate Lake." J.A. 361a.

EPA also issued to Coeur a NPDES permit under Section 402 for discharges from the Lower Slate Lake impoundment into downstream waters. J.A. 287a-331a. Coeur would construct a reverse osmosis treatment system to treat the effluent prior to its discharge, ensuring compliance with total suspended solids and metals limitations. J.A. 303a-305a. The State of Alaska also has certified that those discharges would meet all applicable Alaska water quality standards. J.A. 256a-265a, 485a n.31; Letter from Alaska Dept. of Envtl. Conservation (June 17, 2005) <www.dnr.state.ak.us/mlw/mining/largemine/kensington/pdf/AK0050571Cert.pdf>.

3. a. In September 2005, respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation sued the Corps in the District Court for the District of Alaska, seeking a judicial order that would invalidate the Section 404 permits. Respondents contended that the discharge of tailings under the Coeur permit would violate Sections 301 and 306 of the Act, given the existence of an EPA new-source performance standard limiting the discharge of process wastewater from a froth-flotation mill. The State of Alaska, Coeur, and Goldbelt intervened as defendants. Pet. App. 7a-8a.

b. On August 4, 2006, the district court granted summary judgment to the Corps and dismissed the complaint. Pet. App. 39a-56a. The district court held that the Section 404 permitting process is an "exception" to the NPDES permit process under Section 402, and that the issuance of Section 404 permits for the discharge of fill material is governed by the Section 404(b)(1) Guide-

lines rather than by Sections 301 and 306. *Id.* at 51a. The court further determined that the Corps' and EPA's jointly promulgated fill rule was valid, and that the proposed discharge of a tailings slurry into the Lower Slate Lake impoundment qualifies as a "discharge of fill material" under the plain terms of that rule because it would "change the bottom elevation" of the lake. *Id.* at 53a. In rejecting respondents' contention (based on excerpts from the regulatory preamble) that the agencies had not intended to include mine tailings in the definition of fill material, the court explained that other portions of the preamble (specifically addressing tailings) contradicted that contention. *Id.* at 53a-55a (citing 67 Fed. Reg. at 31,130, 31,135). Because respondents did not dispute that Coeur's permit satisfied the Section 404(b)(1) Guidelines, *id.* at 51a n.44, and did not make any independent argument against the validity of Goldbelt's permit, *id.* at 56a, the district court upheld both permits, *ibid.*

c. The court of appeals reversed. Pet. App. 1a-35a.

The court of appeals held that, "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." Pet. App. 17a. In the court's view, CWA Sections 301 and 306 unambiguously prohibit all pollutant discharges, including discharges of dredged or fill material, that are contrary to the effluent limitations and performance standards promulgated under the Act. *Id.* at 15a-17a. The court relied principally on those provisions' use of the terms "any" and "all." *Id.* at 15a. The court concluded on that basis that EPA's promulgation of a performance standard displaces the Corps' Sec-

tion 404 permitting regime in favor of EPA's Section 402 permitting program. *Id.* at 17a-18a.

The court of appeals stated that the regulatory history "further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of 'fill material' to replace the performance standard for froth-flotation mills." Pet. App. 19a. The court acknowledged that, in the 2002 fill rule, EPA and the Corps had jointly adopted an effects-based definition of "fill material" and had defined "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." *Id.* at 29a (quoting 33 C.F.R. 323.2(e) and (f); 40 C.F.R. 232.2). The court interpreted other language in the preamble to the fill rule, however, as indicating a contrary intent, and it concluded that "the performance standard governs because it is more specific." *Id.* at 26a-27a, 32a.

The court of appeals concluded that Coeur's permit "violates § 301 and § 306 of the Clean Water Act." Pet. App. 34a. It remanded to the district court to vacate that permit, as well as Goldbelt's Section 404 permit (on the ground that it depended on the validity of Coeur's permit) and the Forest Service's ROD (approving the plan of operations). *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a discharge of mine tailings that constitutes a "discharge of fill material" under the plain terms of the agencies' joint definition must be regulated by EPA under Section 402 of the CWA, rather than by the Corps under Section 404 of the CWA. The text, structure, and purpose of both the Act and the 2002 fill rule—as well as the Corps' and EPA's considered construction of the Act and their own

regulation—make clear that discharges of "fill material" are subject only to the Section 404 permitting process. The relevant provisions of law also make clear that the Corps, in determining whether to grant a Section 404 permit application for such a discharge, is not required to apply new-source performance standards adopted by EPA pursuant to Section 306. The Ninth Circuit fundamentally erred in rejecting the agencies' controlling interpretations of the pertinent statutory and regulatory provisions, and in setting aside the Section 404 permits at issue in this case.

A. The text of the pertinent provisions of the CWA unambiguously answer the question presented. CWA Sections 402 and 404 establish a dual-permitting structure, reflecting Congress's determination that discharges of fill material raise concerns distinct from those posed by other pollutant discharges. Section 404 authorizes the Corps to issue permits specifically "for the discharge of dredged or fill material" when certain conditions are satisfied. Section 402 addresses the permitting of discharges *other than* "dredged or fill material" by authorizing EPA to issue permits "[e]xcept as provided in sections [318 and 404]."

While Section 402 emphasizes protection of water-quality concerns by requiring compliance with various effluent limitations, Section 404 takes a broader approach based on the practicability of other alternatives and minimization of overall environmental impacts (including wetlands preservation). The Act and the Section 404(b)(1) Guidelines require that discharges of fill material comply with toxic effluent limitations promulgated under Section 307, but they do *not* require compliance with other effluent limitations.

The Ninth Circuit's decision subverts the Act's careful division of authority between the Corps and EPA and its establishment of distinct criteria for permitting decisions under Sections 402 and 404. The court's reliance on the words "and" and "any" in Sections 301(a), 301(e), and 306(e) was misplaced and overlooks the simple yet crucial point that the provisions require compliance only with *applicable* effluent limitations and performance standards. By the Act's own terms, those limitations and standards do not apply to discharges of fill material.

To the extent that any ambiguity remains, the Corps and EPA have reasonably resolved that ambiguity. Since the Act's initial passage, those agencies consistently have determined that discharges of fill material should be regulated by the Corps under Section 404 and are not subject to EPA effluent limitations (except those promulgated under Section 307). That understanding is reflected in the Section 404(b)(1) Guidelines, in the regulatory definition of "fill material," and in the agencies' final permitting decisions in this case. The Ninth Circuit erred in substituting its own contrary construction for the interpretation reached by the agencies charged with administering the Act.

B. The proposed discharge of tailings at issue in this case constitutes a "discharge of fill material" subject to regulation under Section 404. The 2002 rule jointly promulgated by the Corps and EPA demarcates the line between discharges of fill material regulated under Section 404 and other discharges regulated under Section 402. That carefully drawn line, premised on the effect of the discharge rather than on its purpose, is based on the agencies' expertise and experience.

Under the plain terms of the rule, the tailings slurry at issue here unquestionably constitutes "fill material"

because placement of tailings into the impoundment at Lower Slate Lake would have "the effect of * * * [c]hanging the bottom elevation of any portion of a water of the United States" by 50 feet. 33 C.F.R. 323.2; 40 C.F.R. 232.2. Moreover, the rule specifically provides that a "discharge of fill material" includes the "placement of overburden, slurry, or tailings or similar mining-related materials." *Ibid.* Where (as here) the text provides a clear answer, it is dispositive.

The Ninth Circuit's selective reliance on statements from the preamble to the fill rule and on other regulatory history cannot trump the rule's unambiguous language or the agencies' controlling construction of that text. See *Auer* v. *Robbins*, 519 U.S. 452, 460-461 (1997). In any event, those general statements are contradicted by more specific statements in the preamble clarifying that Section 404 governs mine tailings. EPA's 1982 new-source performance standard, which EPA itself interpreted in light of the 2002 fill rule as inapplicable to the tailings discharge at issue, likewise does not compel a different conclusion.

ARGUMENT

THE PROPOSED DISCHARGES AT ISSUE IN THIS CASE ARE GOVERNED BY SECTION 404 RATHER THAN SECTION 402 OF THE CLEAN WATER ACT

At issue in this case is whether a discharge of fill material should be regulated under Section 404, the provision of the Clean Water Act specifically designed to govern such discharges, or rather under Section 402, simply because EPA has promulgated an otherwise applicable effluent limitation. The text, structure, and purpose of the Act—in particular, its creation of a dual-permitting regime—make clear that Congress intended to subject

the discharge of fill material to the requirements of Section 404 (which are tailored to the unique concerns of such discharges) and not to the separate requirements (including new-source performance standards) applicable to other pollutant discharges under Section 402. To the extent that any ambiguity exists, the Corps and EPA have consistently interpreted the Act as authorizing the Corps to issue Section 404 permits for the discharge of fill material even where an effluent limitation would otherwise apply. The Ninth Circuit erred in disregarding the text of the Act and that permissible administrative interpretation.

Under the controlling regulatory definitions, the tailings at issue in this case constitute "fill material," and the proposed discharge constitutes a "discharge of fill material." Respondents do not challenge the validity of the Corps' and EPA's jointly promulgated definitions of the relevant statutory language, nor do they dispute that the discharge of tailings proposed here falls squarely within the plain terms of those definitions. The Ninth Circuit erred in rejecting the agencies' controlling interpretation of their own regulation. The court's holding unjustifiably undermines the Act's explicit charge to the Corps and EPA to treat the discharge of fill material differently from other discharges, and distorts the dividing line carefully drawn by those agencies after their considered collaboration.

A. A Discharge Of Fill Material Is Subject To Section 404's Permitting Scheme, Notwithstanding EPA's Promulgation Of An Otherwise Applicable Effluent Limitation

As set out above (pp. 2-3, *supra*), the Clean Water Act prohibits the discharge of any pollutant into the waters of the United States, except (with discrete excep-

tions not applicable here) pursuant to a permit. 33 U.S.C. 1311. Permits may be issued pursuant to either Section 404 or Section 402. The basic question in this case is which permitting provision applies to a "discharge of fill material" within the meaning of Section 404, when the substance being discharged would otherwise be covered by an EPA effluent limitation. The text, structure, and purpose of the Act compel the conclusion—reached by the agencies charged with administering the Act—that such discharges are subject to the Section 404 permitting process.

1. The text, structure, and purpose of the Act dictate that a discharge of fill material be regulated under Section 404, not under Section 402

Section 404 of the CWA authorizes the Corps to issue permits specifically "for the discharge of dredged or fill material" into waters of the United States when certain conditions are satisfied. 33 U.S.C. 1344(a). In contrast, Section 402 governs *other* discharges into waters of the United States by stating that, "*[e]xcept as provided in sections [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants," when certain other requirements are met. 33 U.S.C. 1342(a) (emphasis added).[4] By the

[4] Section 318 allows EPA to issue permits for discharges associated with certain aquaculture projects. 33 U.S.C. 1328. As originally enacted, Section 318 provided only that the EPA Administrator was to "establish * * * procedures and guidelines he deems necessary to carry out this section." Federal Water Pollution Control Act, Pub. L. No. 92-500, § 318, 86 Stat. 877. In 1977, Congress amended that section to authorize EPA to permit aquaculture discharges "pursuant to [Section 402]" and to establish regulations "requir[ing] the application to such discharge[s] of each criterion, factor, procedure, and requirement applicable to a permit issued under section [402]." 33 U.S.C. 1328(a)

use of that "except" clause, Congress mandated that the specific Section 404 permitting regime, rather than the more general Section 402 NPDES permitting regime, be used in regulating discharges of dredged or fill material. For the regulation of discharges of dredged or fill material, Section 404 thus serves as an explicit exception to Section 402's otherwise unqualified reach. It is well established that a specific provision of a statute prevails over a more general section of the same statute. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002); *Clifford F. MacEvoy* v. *United States for the Use & Benefit of Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944).

Applying that basic canon of construction not only provides the most natural reading of the Act's text, but also preserves Congress's different treatment of the two types of discharges in light of their different impacts. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." 65 Fed. Reg. 21,293 (2000); see *Rapanos* v. *United States*, 547 U.S. 715, 745 (2006) (plurality opinion) (discussing distinction between dredged or fill material and other pollutants, and stating that "[t]he Act

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and (b) (amended by Clean Water Act of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599). If the Ninth Circuit were correct that all discharges (even those expressly excepted from the reach of Section 402) must comply with Section 402's requirements (principally, EPA effluent limitations), then Congress's amendment to Section 318 would have been unnecessary. Notably, Congress has not added such language to Section 404.

recognizes this distinction by providing a separate permitting program for such discharges in § 1344(a)").

Section 402 covers an array of "discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like." 65 Fed. Reg. at 21,293. Section 402 controls pollutant discharges by requiring compliance with various effluent limitations. *Ibid*. In particular, Section 402 expressly requires compliance with new-source performance standards promulgated by EPA pursuant to Section 306. 33 U.S.C. 1342(a)(1). The Section 402 permitting program does *not* require an evaluation of alternatives to a proposed discharge or consideration of impacts from discharges that convert waters of the United States to dry land. 65 Fed. Reg. at 21,293.

By contrast, Section 404 focuses exclusively on discharges of dredged and fill material. 33 U.S.C. 1344(a)(1). As the Corps and EPA have explained, "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern [from the discharge of fill material] is the loss of a portion of the water body itself." 65 Fed. Reg. at 21,293. The Section 404 permitting process therefore focuses on considerations different from those implicated by the Section 402 program. *Ibid*.

The distinct concerns arising from the discharge of dredged or fill material are addressed primarily by the Section 404(b)(1) Guidelines, developed jointly by EPA and the Corps. 33 U.S.C. 1344(b). As described above (pp. 3-4, *supra*), the Section 404(b)(1) Guidelines take a broad-scale approach compared to Section 402's more targeted focus on water quality. The Guidelines preclude granting a permit if "there is a practicable alternative to the proposed discharge," including an alternative

that does not involve disposal into navigable waters, "which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The Guidelines also require consideration of the effects of the discharge on the aquatic ecosystem as a whole (40 C.F.R. 230.10(c)), as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects (40 C.F.R. 230.10(d)).

That is not to say Section 404(b)(1) Guidelines disregard water-quality concerns. To the contrary, the Guidelines provide for the consideration of the effects of contaminants on water quality in a number of ways, specifically requiring compliance with applicable State water quality standards (40 C.F.R. 230.10(b)(1)); appropriate use of chemical and biological testing to evaluate contaminant effects (40 C.F.R. 230.11(d) and (e), 230.60, 230.61); and compliance with toxic effluent limitations promulgated under Section 307 (40 C.F.R. 230.10(b)(2)).

While the Act itself also authorizes EPA (in consultation with the Corps) to subject discharges of dredged material to toxic effluent limitations (33 U.S.C. 1317(a)(5)), neither Section 404 nor the Section 404(b)(1) Guidelines—in stark contrast to Section 402—require compliance with other effluent limitations, including Section 306's performance standards. That distinction reflects the careful balance struck by Congress and the administering agencies between water quality and the other weighty considerations when it comes to the discharge of dredged and fill material—a balance that the Ninth Circuit's decision fails to respect. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act,

it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).[5]

Finally, the Act's legislative history confirms that Congress intended to treat discharges of fill material differently from other discharges. As originally proposed in the Senate, the Act did not contain a separate permitting provision for discharges of fill material, but rather would have subjected them to EPA's permitting requirements under Section 402, including its effluent limitations. See S. 2770, 92d Cong. 1st Sess. § 402 (1971). In contrast, the House bill provided the Corps exclusive authority over discharges of fill material with only minimal EPA involvement. See 118 Cong. Rec. 10,632 (1972). The CWA, as enacted, reflects a compromise: it gives the Corps primary permitting authority over discharges of fill material but also gives EPA environmental oversight within the Section 404 process, both

[5] A comparison of Sections 402(k) and 404(p), 33 U.S.C. 1342(k) and 1344(p), reinforces the conclusion that discharges of dredged and fill material are not subject to EPA's Section 306 performance standards. Section 402(k) states that, for purposes of the CWA's enforcement provisions, "[c]ompliance with a permit issued pursuant to [Section 402] shall be deemed compliance * * * with sections" 301, 302, 306, 307, and 403 of the CWA. Section 402(k) ensures that, in a citizen suit (see 33 U.S.C. 1365) alleging that a Section 402 permittee has violated Section 306, EPA's antecedent determination during the permitting process that the authorized discharges will satisfy new-source performance standards will be deemed controlling. With respect to Section 404 permittees, Section 404(p) confers an analogous immunity from enforcement actions but refers only to Sections 301, 307, and 403, not to Section 302 or 306. The absence of any reference to Section 306 would be inexplicable if Congress had anticipated that the Corps would apply new-source performance standards in considering applications for Section 404 permits.

through the Section 404(b)(1) Guidelines and through EPA's Section 404(c) veto power. 33 U.S.C. 1344; see S. Rep. No. 1236, 92nd Cong., 2d Sess. 1, 72-77, 141-142 (1972). Unlike the bill originally proposed in the Senate, the CWA as ultimately enacted does not require that discharges of fill material comply with EPA's effluent limitations under Section 402. See 33 U.S.C. 1344. The effect of the Ninth Circuit's decision in this case is thus to reinsert a requirement that Congress specifically considered but declined to enact, and to upset the balance struck by Congress in the permitting scheme that ultimately became law.

2. The Ninth Circuit's interpretation cannot be reconciled with the unambiguous terms of the Act

Notwithstanding Section 404's clear allocation to the Corps of permitting authority over discharges of fill material, and the absence in Section 404 of any reference to effluent limitations established by EPA (other than those under Section 307), the court of appeals concluded that such discharges must comply with Section 402's permitting requirements (and with Sections 301(e) and 306(e)) whenever a relevant effluent limitation exists. The court first relied (Pet. App. 15a) on Section 301(a)'s requirement that, "[e]xcept as in compliance with [Section 301] and [S]ections [302, 306, 307, 318, 402 and 404] * * * the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. 1311(a). In the court's view, the use of the word "and" in that list means that *all* discharges of pollutants into waters of the United States must comply with the requirements of *all* the listed provisions, including the effluent limitations of Sections 301 and 306.

The Ninth Circuit's reading of the general list of CWA provisions contained in Section 301(a) logically implies that dischargers of fill material must secure both a Section 402 permit and a Section 404 permit (in order to comply with Section 402 "and" Section 404). The court of appeals pointedly declined to embrace that conclusion, however, stating instead that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation under § 301 or a standard of performance under § 306." Pet. App. 18a. Respondents likewise recognize that, under the CWA, "only one permitting program is applicable to any given discharge." Br. in Opp. 20. And, under the plain terms of the statute, the determination of *which* permitting scheme applies (*i.e.*, Section 402 or Section 404) depends on whether the relevant pollutant constitutes "dredged or fill material"—not on whether the substance being discharged is otherwise potentially subject to an EPA effluent limitation.

Congress's use of the word "and" in Section 301(a) is best understood to mean that a discharge of pollutants into navigable waters is unlawful unless it complies with the *overall body of law* established by Sections 301, 302, 306, 307, 318, 402, and 404 taken together. If Congress were to provide in some other statute that particular pollutants may not be discharged "except as in compliance with the CWA," the reference to "the CWA" would of course encompass all of the specific provisions enumerated above. A directive that pollutant discharges comply with "the CWA," however, would not suggest that every CWA provision is applicable to every discharge. Similarly here, Section 301(a)'s requirement that every discharge comply with a defined subset of the

CWA does not answer which permitting regime applies to a particular type of discharges, including those at issue in this case.[6]

The court of appeals also relied on Sections 301(e) and 306(e). Pet. App. 12a-14a. Section 301(e) states that effluent limitations "shall be applied to all point sources of discharge of pollutants *in accordance with the provisions of this chapter*." 33 U.S.C. 1311(e) (emphasis added). Because the term "provisions of this chapter" encompasses the entire Act, that section simply begs the question whether Section 404, the governing provision, requires application of a particular effluent limitation to the discharge of fill material. Similarly, Section 306(e) makes it unlawful to operate any new source "in violation of any standard of performance *applicable to such source*." 33 U.S.C. 1316(e) (emphasis added). To determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole and, in particular, to Section 404 when the discharge of fill material is at issue. And, as explained above, the availability of a Section 404 permit for a discharge of fill material is not contingent on the regulated party's compliance with any new-source performance standard promulgated under Section 306.[7]

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[6] Congress could not have achieved greater clarity by using the word "or" rather than "and" in Section 301(a). To the contrary, use of the term "or" might have suggested that a discharge governed by Section 402 need only comply with Section 301 effluent limitations *or* Section 306 new-source performance standards—contrary to Section 402's express requirement that discharges subject to the NPDES permitting regime must satisfy both of those provisions. See 33 U.S.C. 1342(a)(1).

[7] The Ninth Circuit also relied (Pet. App. 14a-15a) on this Court's statement in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) (*du Pont*), that effluent limitations promulgated under Sections

Thus, the text, structure, and purpose of the Act unambiguously establish a straightforward scheme. If a discharge of pollutants into waters of the United States constitutes a discharge of "dredged or fill material," then it is subject to Section 404's extensive permitting requirements, including the Section 404(b)(1) Guidelines. Other pollutant discharges into navigable waters, by contrast, are subject to Section 402's separate requirements, including new-source performance standards promulgated under Section 306. The court of appeals' decision in this case dismantles that carefully constructed framework and cannot be squared with the text of the statute enacted by Congress.

3. The Corps' and EPA's longstanding interpretations of the Act's regulatory scheme resolve any ambiguity

Even if the relevant CWA provisions did not squarely answer the question presented here, the Corps and EPA have reasonably resolved any ambiguity that may exist. See, *e.g.*, *Rapanos*, 547 U.S. at 758 ("Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway in interpreting the statute they are entrusted to administer.") (Roberts, C.J., concurring) (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984)). Since the Act's passage, those agencies consistently

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301 and 306 are meant to be "absolute prohibitions." The court of appeals' reliance on *du Pont* was misplaced. The Court in *du Pont* simply held that, *where the effluent limitations apply*, the CWA does not authorize variances for individual owners or operators. *Ibid.* The Court did not suggest that the performance standards apply to, or are to be enforced through, Section 404 permits. To the contrary, the Court referenced only permits issued under Section 402. *Id.* at 124. ("The permits granted under § 402 * * * incorporate these across-the-board limitations.").

have determined in rulemakings, permit actions, and official memoranda that discharges of fill material are regulated categorically by the Corps under Section 404 and are not subject to certain EPA effluent limitations, such as Section 306 performance standards. Those long-standing administrative determinations are entitled to respect.

First, in 1973, EPA promulgated a regulation providing that "[d]redged or fill material discharged into navigable waters" does "*not* require an NPDES [*i.e.*, Section 402] permit." 40 C.F.R. 125.4(d) (1973) (emphasis added). That regulation is still in place today, in virtually identical form. 40 C.F.R. 122.3(b). Second, as noted earlier (pp. 21-22, *supra*), the Section 404(b)(1) Guidelines (first issued in 1975)—while requiring discharges of fill material to comply with toxic effluent standards promulgated under Section 307 (40 C.F.R. 230.10(b)(2))—do not require compliance with other effluent limitations, including Section 306 performance standards. Third, in 1986, the Corps and EPA clarified that "[d]ischarges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8871. Fourth, the Corps and EPA stated in the preamble to the 2002 fill rule that "[e]ffluent limitation guidelines and new source performance standards ('effluent guidelines') promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section *402* of the Act. *EPA has never sought to regulate fill material under effluent guidelines.*" 67 Fed. Reg. at 31,135 (emphasis added).

The agencies also have made clear that their long-standing administrative interpretations of the CWA's permitting requirements apply to the discharges at issue in this case. For example, EPA concluded in an authoritative 2004 memorandum that, because the proposed discharges at issue here would constitute discharges of fill material, "the regulatory regime applicable to discharges under section 402, *including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J)*, do *not* apply to the placement of tailings into the proposed impoundment." J.A. 144a-145a (emphasis added). Likewise, the Corps' issuance of the Section 404 permit (accompanied by a 68-page Revised ROD and Permit Evaluation) for Coeur's proposed discharges, notwithstanding the existence of the Section 306 new-source performance standard for mines using the froth-flotation process, confirms the Corps' agreement with EPA's interpretation. J.A. 340a-377a.

Underlying all those agency expressions, spanning from 1973 to the present, is the determination that a discharge of fill material should be regulated under Section 404, notwithstanding EPA's promulgation of a Section 306 performance standard that might otherwise be applicable under Section 402. For all the reasons discussed above (pp. 17-26, *supra*), the Corps' and EPA's interpretations are reasonable. The Ninth Circuit thus erred in substituting its own construction of the Act. See *Chevron*, 467 U.S. at 843.

B. The Corps And EPA Properly Concluded That The Proposed Discharge Of Mine Tailings Constitutes A "Discharge Of Fill Material"

Because a discharge of fill material is subject to regulation under Section 404, and thus not subject to a Section 306 performance standard, the only remaining question is whether the discharge of tailings at issue here qualifies as a "discharge of fill material." The answer from both expert agencies charged with administering the Act—consistent with the plain terms of their jointly promulgated regulation—is yes.

1. The agencies' considered adoption of an effects-based definition of "fill material" provides an administrable line between Section 402 and Section 404 discharges

Because the Act does not define the term "fill material," "the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Corps and EPA have filled the statutory gap by jointly promulgating the 2002 fill rule, which defines "fill material" to mean

> material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.

33 C.F.R. 323.2(e)(1) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). The rule specifically defines "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

That, of course, is not the only conceivable definition. Indeed, the Corps and EPA have modified their respective definitions of "fill material" over the years. The current regulatory definition, however, is reasonable and thus entitled to deference—especially given that the agencies explained at great length their reasons for the 2002 revision. See, *e.g.*, *Chevron*, 467 U.S. at 863-864 ("[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

Before promulgation of the 2002 fill rule, "the Army and EPA definitions of 'fill material' differ[ed] from each other, and this * * * resulted in regulatory uncertainty and confusion." 65 Fed. Reg. at 21,292. The principal difference (at least since 1980) was that the Corps' definition of the term "fill material" was based on the "primary purpose" of the discharge (*i.e.*, whether it was intended to create fill or rather to dispose of waste), whereas EPA's definition was based solely on the *effects* of the discharge (*i.e.*, whether it converted waters to dry land or changed the bottom elevation of the relevant waterbody).[8] The 2002 fill rule, which contains the agen-

[8] In 1975, the Corps and EPA both defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body *for any purpose*." 40 Fed. Reg. at 31,325; *id.* at 41,298 (emphasis added). In 1977, the Corps redefined "fill material" as "any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402." 42 Fed. Reg. at 37,145 (emphasis added). In 1980, EPA revised its definition of "fill material" to mean (consistent with both the 1975 and the current definition) "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a

cies' joint definition of the term "fill material," was intended to resolve that discrepancy and to "ensure proper, consistent, and more effective regulation under the CWA." *Ibid*.

In reconciling their prior definitions, the Corps and EPA chose the effects-based approach over the "primary purpose" approach, excising any reference to the purpose of the discharge. The agencies explained that the "primary purpose" test had required the Corps to make difficult subjective determinations about the purposes of prospective discharges, allowed manipulation by prospective dischargers, and caused inconsistent treatment of similar discharges. 65 Fed. Reg. at 21,294. That led to confusion and engendered extensive litigation, undermining the Section 404 program's ability to protect the aquatic environment and the overall public interest. *Ibid.* The agencies reasoned that those problems could be avoided by adopting an objective definition of "fill material," similar to that already used by EPA, based on the effect of the proposed discharge rather than on its purpose. *Id.* at 21,294-21,295; see 67 Fed. Reg. at 31,132-31,133 ("[T]he objective standard created by the effects-based test will yield more consistent results in determining what is 'fill material'" and "help[] ensure that discharges with similar environmen-

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water body *for any purpose*." 45 Fed. Reg. at 33,421 (emphasis added). In 1986, in their last pronouncement before the 2002 fill rule, the Corps and EPA entered into a Memorandum of Agreement (MOA) to clarify the appropriate permitting program for regulating certain discharges of solid waste arising from their then-conflicting definitions of "fill material." 51 Fed. Reg. at 8871. That MOA adopted a case-specific approach, drawing on elements from both agencies' definitions as part of a multi-factor inquiry to determine whether a discharge involved "fill material." *Id.* at 8872.

tal effects will be treated in a similar manner under the regulatory program."). As the Corps and EPA concluded, "these benefits provide sufficient justification for [the] rule change." *Id.* at 31,132.

In response to comments, the Corps and EPA noted the absence of "any indication that Congress intended to exclude discharges for purposes of waste disposal entirely from coverage under section 404." 67 Fed. Reg. at 31,134. The agencies explained that "[s]imply because a material is disposed of for purposes of waste disposal does not, in our view, justify excluding it categorically from the definition of fill. * * * Instead, where a waste has the effect of fill, we believe that regulation under the section 404 program is appropriate." *Id.* at 31,133. The agencies further observed that the 2002 fill rule is generally "consistent with existing regulatory practice," under which the Corps pursuant to Section 404, rather than EPA pursuant to Section 402, has regulated such discharges. *Id*. at 31,129-31,130.

The fill rule promulgated by the Corps and EPA in 2002 reflects a reasonable interpretation of the term "fill material" in Section 404. Indeed, the court of appeals did not suggest, and respondents do not appear to contend, that the proposed discharges at issue here fall outside Section 404 simply because they would be undertaken to achieve waste-disposal objectives rather than *for the purpose* of raising the bottom elevation of Lower Slate Lake.

2. The agencies' conclusion that the proposed discharge constitutes a "discharge of fill material" under the fill rule is controlling

Under the plain terms of the current regulatory definition, the tailings slurry at issue in this case unquestionably constitutes "fill material." That is so both because the placement of tailings into the impoundment Lower Slate Lake will have "the effect of * * * [c]hanging the bottom elevation of a water of the United States," 33 C.F.R. 323.2(e)(1); 40 C.F.R. 232.2, and because the regulatory definition of "discharge of fill material" specifically encompasses the "placement of overburden, slurry, or tailings or similar mining-related materials," 33 C.F.R. 323.2(f); 40 C.F.R. 232.2. The text of the regulation is therefore dispositive here.

The court of appeals construed the fill rule to provide that "wastes subject to performance standards and effluent limitations would not be considered 'fill material.'" Pet. App. 20a. Nothing in the regulation itself, however, suggests that a particular discharge's status as "fill material" subject to the Section 404 permitting process turns on whether EPA has issued an effluent limitation for the discharge of a particular pollutant. To the contrary, by its terms, the applicability of the regulatory definition depends on whether the discharge will replace a portion of the waters of the United States with dry land or raise the bottom elevation of a navigable waterbody. Nor did the court of appeals identify any common understanding of the term "fill material" that would attach decisive weight to the presence or absence of an EPA effluent limitation.

In concluding that the agencies intended Section 402 to govern the discharges at issue here, see Pet. App. 20a, 22a-31a, the court of appeals focused not on the text

of the regulation, but on selected statements from the preamble of the fill rule and other regulatory history. Neither the preamble nor the regulatory history, however, can trump the unambiguous text of the rule. See *National Wildlife Fed'n* v. *EPA*, 286 F.3d 554, 569-570 (D.C. Cir. 2002) ("The preamble to a rule is not more binding than a preamble to a statute. * * * Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.") (citation omitted); cf. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.") (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994)). The authority suggesting that an agency's interpretation of its regulation cannot conflict with the agency's intent at the time of promulgation—see Pet. App. 19a-20a (citing cases)—comes into play only where the regulation's text is ambiguous. See, *e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005) ("Whatever the correct explanation for the Secretary's ambiguous (and apparently ambivalent) statement may be, it is not sufficient to overcome the clear statements in the text of the regulations that support our holding."); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945) (canons of regulatory construction triggered only "if the meaning of the words used is in doubt"). That is not the case here.

Rather, where the terms of the regulation are clear, and the agency interpretation is consistent with those terms, that interpretation is "controlling." *Auer*, 519 U.S. at 460-461 (agency interpretation is "controlling unless plainly erroneous or inconsistent with the regulation") (citation omitted). EPA and the Corps agree that "the text of the rule makes clear that mine tailings

placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material." J.A. 144a; see J.A. 340a-377a. Deference to the agencies' construction is especially warranted here because the regulation concerns "a complex and highly technical regulatory program," in which the relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). In substituting its determination for the agencies', the Ninth Circuit impermissibly abandoned those key principles.

On the whole, moreover, the preamble and regulatory history are consistent with the Corps' and EPA's determination under the fill rule that the tailings discharges at issue here should be regulated under Section 404. The Ninth Circuit focused (Pet. App. 26a-29a) on isolated statements in the preamble and in the agencies' joint Response to Comments that could be read to suggest that discharges subject to effluent limitations should be regulated under Section 402.[9] In the same

[9] The cited passage from the preamble reads:

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some dis-

preamble, however, the agencies stated that "EPA has never sought to regulate fill material under effluent guidelines"; that "any mining-related material that has the effect of fill when discharged will be regulated as 'fill material'"; that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials"; and that "the phrase[] * * *

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charges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA. Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

67 Fed. Reg. at 31,135.

The cited excerpts from the agencies' Response to Comments read:

- [U]nder today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or an NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa. J.A. 83a.
- [T]he suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case—no discharges that were previously prohibited are now authorized as a result of this rulemaking. J.A. 32a.
- Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. J.A. 48a.

'placement of overburden, slurry, or tailings or similar mining-related materials' ha[s] been added to the definition of 'discharge of fill material' to provide further clarification of the types of activities regulated under section 404." 67 Fed. Reg. at 31,130, 31,135. And, in their Response to Comments, the Corps and EPA stated (after referring to "the two broad categories" of overburden and mining by-products) that "[w]here the discharge of both types of materials into waters of the United States will result [] in a change in the bottom elevation, * * * both materials clearly qualify as 'fill material' under this rule, and their discharge into waters of the United States will be regulated by the Corps under section 404 of the Act." J.A. 93a.

To be sure, the preamble is scarcely a model of clarity, but the latter statements—specific to mining materials—should control over the more general statements regarding the treatment of discharges subject to effluent limitations. And the rule's text (which expressly *includes* the discharge of tailings) contains no exception from the definition of fill material based on the existence of effluent limitations promulgated under Sections 301, 304, or 306; nor does it state that discharges potentially subject to such limitations are to be regulated under Section 402 instead. Indeed, the Corps and EPA considered but deleted such an exception when finalizing the proposed rule. See 67 Fed. Reg. at 31,135.

The court of appeals also relied (Pet. App. 30a-31a) on the pre-permit history in this case, citing the Corps' 1998 ROD and EPA's 2005 ROD. The court, however, misunderstood the statements upon which it relied. The court noted the Corps' statement in the 1998 ROD that the Corps "does not regulate the placement of tailings." Pet. App. 31a (quoting C.A. E.R. 257). But, as the con-

text makes clear, the Corps there was referring to the placement of tailings *into a dry stack* (the storage method proposed at that time), which requires no CWA permit (either under Section 404 or under Section 402) because it does not involve a discharge into the waters of the United States. See C.A. E.R. 257. The court of appeals also relied on EPA's determination in the 2005 ROD that, "[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project." Pet. App. 31a (quoting J.A. 291a). But that statement referred to the need for a Section 402 permit for the discharge *from* the tailings impoundment, not into it. See J.A. 292a, 301a-305a. In any event, earlier statements by an agency are irrelevant because courts ordinarily are "empowered to review only an agency's *final* action." *National Assoc. of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007). That principle is especially pertinent where, as here, the governing rule has changed during the administrative process. Accordingly, the regulatory history provides no basis for displacing either the rule's plain language or the agencies' controlling interpretation of that language.[10]

Nor does the 1982 new-source performance standard (limiting discharge of process wastewater from froth-

[10] The Ninth Circuit also cited (Pet. App. 24a n.10) two Corps memoranda for the proposition that the Corps has regularly declined to exercise Section 404 permitting authority over the discharge of mine tailings. Those internal, informal memoranda were prepared under the Corps' former "primary purpose" definition of "fill material," which was superseded by the 2002 regulation. In any event, those memoranda by agency personnel in the field did not purport to decide the Corps' official position even at the time they were drafted. See C.A. E.R. 178 ("request[ing] that the question be referred to the Washington level for resolution").

flotation gold mills, 40 C.F.R. 440.104) require a different outcome. That standard does not unambiguously contemplate application to discharges of fill material (such as mine tailings) regulated under Section 404. EPA explained in the preamble to that standard that "[t]he requirements for direct dischargers were to be incorporated into [NPDES] permits issued under section 402 of the Act," not into Section 404 permits. 47 Fed. Reg. 25,682 (1982). In the 26 years since promulgation of that new-source performance standard, EPA has never applied it to a discharge that EPA and the Corps had determined to be a discharge of fill material. See 67 Fed. Reg. at 31,135 ("EPA has never sought to regulate fill material under effluent guidelines."). And EPA has made clear its view that the 1982 performance standard does *not* apply to the proposed discharges at issue in this case. J.A. 144a-145a ("the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment").

Contrary to the Ninth Circuit's suggestion (Pet. App. 31a-32a), the fill rule does not render the 1982 new-source performance standard a practical nullity. Where a particular discharge of process wastewater from a froth-flotation mill does not satisfy the definition of fill material (*e.g.*, because its ratio of liquid to solids is such that the discharge would not be expected to raise the bottom elevation of the relevant waterbody), the discharge is regulated under Section 402 and thus remains subject to the performance standard. Conversely, however, the Ninth Circuit's decision *does* effectively nullify the portion of the 2002 fill rule that specifically includes

tailings within the regulatory definition of "discharge of fill material."

It is also not evident that application of the 1982 standard would necessarily be more environmentally protective than application of the Section 404(b)(1) Guidelines. In this case, for example, the Forest Service and the Corps (based on its Section 404 analysis, which includes consideration of the loss of wetlands and other environmental factors not considered under Section 402) both determined that the discharge into the Lower Slate Lake impoundment was the "environmentally preferable alternative." J.A. 218a, 354a. And respondents did not challenge that determination below. In any event, the 1982 standard predates the definition of "fill material" in the 2002 fill rule, which expressly brings the discharge of mine tailings into Section 404's regime. The later-in-time regulation, jointly adopted by the Corps and EPA and amply supported by the agencies' detailed explanations, is controlling here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2008

APPENDIX

1. Section 301 of the Clean Water Act, 33 U.S.C. 1311, provides in relevant part:

Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

* * * * *

2. Section 306 of the Clean Water Act, 33 U.S.C. 1316, provides in relevant part:

National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction

which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

* * * * *

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

3. Section 307 of the Clean Water Act, 33 U.S.C. 1317, provides in relevant part:

Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

* * * * *

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best

available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements.

* * * * *

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

* * * * *

4. Section 402 of the Clean Water Act, 33 U.S.C. 1342, provides in relevant part:

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable require-

ments under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * * * *

5. Section 404 of the Clean Water Act, 33 U.S.C. 1344, provides in relevant part:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application addition-

ally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

* * * * *

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and

1365 of this title, with sections 1311, 1317, and 1343 of this title.

* * * * *

6. Section 502 of the Clean Water Act, 33 U.S.C. 1362, provides in relevant part:

Definitions

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

7. 33 C.F.R. 323.2 provides in relevant part:

Definitions.

For the purpose of this part, the following terms are defined:

* * * * *

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facil-

ities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

8. 40 C.F.R. 122.3 provides in relevant part:

Exclusions.

The following discharges do not require NPDES permits:

* * * * *

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

* * * * *

9. 40 C.F.R. 230.10 provides:

Restrictions on discharge.

NOTE: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in §230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill

its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their by-products outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

10. 40 C.F.R. 232.2 provides in relevant part:

Definitions.

* * * * *

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; * * * and artificial reefs.

* * * * *

Fill material. (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

* * * * *

11. 40 C.F.R. 440.104 provides, in relevant part:

New source performance standards (NSPS).

Except as provided in Subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by the application of the best available demonstrated technology (BADT):

(a) The concentration of pollutants discharged in mine drainage from mines that produce copper, lead, zinc, gold, silver, or molydbenum bearing ores or any combination of these ores from open-pit or underground operations other than placer deposits shall not exceed:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Milligrams per liter	
Cu	0.30	0.15
Zn	1.5	0.75
Pb	0.6	0.3
Hg	0.002	0.001
Cd	0.10	0.05
pH	([1])	([1])
TSS	30.0	20.0

[1] Within the range 6.0 to 9.0.

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

* * * * *